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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-4081

PHILIP RASTELLI,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of the
State of New York

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

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INTRODUCTION

This is a brief in behalf of the respondent in opposition to a petition for a writ of certiorari to the Court of Appeals of the State of New York.

The petitioner was indicted by the Grand Jury, Suffolk County, in July, 1971, under indictment number 829-71 and charged with sixteen counts of conspiracy and criminal usury. After trial by jury in County Court, Suffolk County, the petitioner was found guilty of one count of criminal conspiracy as a misdemeanor and seven counts of criminal usury as felonies and, on February 7, 1973, he was sentenced to concurrent term of one years on the misdemeanor conspiracy conviction and indeterminate term of four years on each of the criminal usury convictions.

The conviction was unanimously affirmed, without opinion, by the Supreme Court of the State of New York, Appellate Division, Second Department, in an order dated December 3, 1973. The order of the intermediate appellate court was unanimously affirmed in a decision of the Court of Appeals of the State of New York in an opinion rendered on

June 16, 1975.

OPINION BELOW

The order of the Supreme Court of the State of New York, Appellate Division, Second Department, unanimously affirming the conviction without opinion, is officially reported at 43 A.D.2d 699 (1973).

The opinion of the Court of Appeals of the State of New York, unanimously affirming the order of the intermediate appellate court is officially reported at 37 N.Y.2d 240 (1975).

JURISDICTION

The order of the Court of Appeals of the State of New York was entered on or about December 16, 1975, the date the decision was rendered. An extension of time in which to file this brief in response to the petition for a writ of certiorari was granted by this Court, and the time to file has been extended to and including

November 5, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether the petitioner's constitutional right to confront witnesses against him was violated where the statements introducted into evidence against him were made by the petitioner's co-conspirators during the course and in furtherance of the conspiracy, thus falling under a well-established exception to the hearsay rule?

STATUTES INVOLVED

United States Constitution -

Sixth and Fourteenth Amendments.

STATEMENT OF FACTS

1. Summary

This is a case involving the crimes of conspiracy to commit a felon (one count) and of criminal usury (seven counts) which took place in Suffolk County, New York from about December, 1970

to July, 1971. The defendant, Philip Rastelli, was aided in this nefarious enterprise by four co-defendants, and the jury returned a verdict of guilty against all of them. Defendant organized, controlled, operated and supplied the money for the enterprise, and his four co-actors committed the substantive crimes.

The People's case against the defendant rested on direct and circumstantial evidence. William Murray, the People's chief witness, testified that he borrowed $5,000 from the co-defendants and actually received part of the loan from the defendant. Murray paid $150.00 interest each week for four or five months and then experienced difficulty in making the payments. A co-defendant told him to recommend "customers" to them.

Six witnesses (customers) testified that they borrowed varying sums of money from the defend-

ants and repaid it at usurious rates of interest.

In addition, William Murray testified that Suffolk County detectives placed a tape recorder and later a transmitting device on him, and that conversations between him and the co-defendants implicating the defendants were recorded. The tapes, cassettes and transcripts were introduced into evidence.

2. The Substantive Crimes

In order to place this case in its proper perspective, it is necessary to briefly outline the modus operandi of the enterprise.

William Murray testified that he wanted to borrow $5,000 from the defendants. A co-defendant stated that he was not authorized to lend that amount of money and that he would confer with his "higher ups". Several days later, Murray called the co-defendant and the co-defendant stated that Murray would receive $1,500 now and that he

would have to pay three points interest each week. Murray only could repay the principal in units of $500. He received the $1,500 in Nassau County and the co-defendant took Murray's car registration as security. The co-defendant stated that the balance of the loan would be delivered to Murray in New York City (842-860)*.

William Murray went to the Cloud Room, a bar in Queens, and was introduced by a co-defendant to the defendant. The defendant stated that the co-defendants spoke "highly" of Murray, and, therefore, Murray would receive the $5,000 loan. Another co-defendant again confirmed the three points interest payments of $150 each week. Defendant, who was not present when a co-defendant delivered the $1,500 to Murray and took his car registration, stated that there was no need for the security and that Murray's car registration should be returned. Defendant then took out an envelope,

* Numerical references are to the Appellant's Record on Appeal submitted to the Court of Appeals of the State of New York.

gave it to a co-defendant and stated:"Here, hold on to this. This is the rest of the loan." The co-defendant gave the envelope to the co-defendant who previously had delivered the $1,500 to Murray. Later, defendant stated, "Let's give the kid his money and get out of here. It's getting late." Outside the bar, the co-defendant gave Murray this envelope. On the trip home, Murray opened the envelope and counted $3,500 in cash (860-872; count 4).

Murray paid $150 interest each week for four or five months and then experienced difficulty in making the payments. He was told to recommend "customers" to the defendants at four points interest each week. Murray asked why the customers would pay four points when he was paying only three points, and the co-defendant stated that one point goes to two co-defendants, one point goes to two other co-defendants and two points go to the defendant because it's his money (876-883).

On June 15, 1971, William Murray went with a co-defendant to the home of another co-defendant in Brooklyn for a meeting concerning a check of Murray's that had "bounced". Immediately before they arrived, Murray saw the defendant talking to the co-defendant who lived in Brooklyn, on a street corner in front of the co-defendant's house. Detectives Miller and Colon confirmed this observation. The two co-defendants (the defendant left after his conversation with the co-defendant), and Murray then drove to the Cloud Room for an important meeting that lasted several hours (1013-1019; 1783-1786; 2184).

In the Fall of 1970, Louis Breitbach testified that he borrowed $2,000 from the co-defendants at four points ($80) interest each week (603-604). He made many interest payments (605-609; count 9).

In January, 1971, Murray recommended Harold and Arthur Scott to the co-defendants.

They met with the co-defendants and borrowed $2,000 at four points ($80) interest each week. They made several interest payments on Sundays. In the Spring of 1971, they borrowed another $1,000 at three points ($30) interest each week (890-899, 379-414, 481-482, 487-499; counts 10 and 11).

In the Winter of 1971, Murray recommended Richard Brightman to the co-defendants. Brightman borrowed $1,000 at four points ($40) interest each week. Brightman also made several interest payments on Sundays (899-901, 768-780; count 15).

In January, 1971, Mr. Murray recommended Murray Bogatin to the co-defendants (909-912). Bogatin borrowed $3,000 at four points ($120) interest each week (912-920). He made several interest payments on Sundays (909-922; count 3).

In February or March, 1971, James Lemanski testified that he borrowed $500 from the co-defendants at four points ($20) interest each week (282-298). He made many interest payments (307-310;

count 5).

3. The Tape Recordings

During the months of March to July, 1971, William Murray testified that Suffolk County detectives placed a tape recorder and later a transmitting device on him, and that conversations between him and the co-defendants were recorded. The tapes, cassettes and transcripts were introduced into evidence (944-961, 980-992, 995-1000, 1002-1021, 1027-1038, 1040-1045).

William Murray testified that before he received the balance of his loan, a co-defendant stated that they would meet his boss, "a fellow by the name of Rusty". At a bar in Queens, Murray was introduced to "Rusty", who was the defendant (861-866). Additionally, on the cross-examination of Detective Miller by the defendant's attorney, Miller stated that he saw the defendant and a co-defendant talking in Brooklyn shortly

before Murray and another co-defendant arrived there for a meeting (see Facts, supra, p.9). The corss-examination was as follows:

> Q. So that as you approached this intersection Bill Murray and whoever was with him, was out of the car walking over to Frank (co-defendant). A. That's right.
> Q. And Rusty? A. That's right, sir.
> Q. At that time? A. Yes, sir (p.1792)

It is clear, therefore, that when the tapes and transcripts refer to "Rusty", it is the defendant. Parenthetically, defendant concedes, by his failure to raise this argument, that he is the "Rusty" mentioned in the tapes.

On the transcript of March 14, 1971, there is a discussion between William Murray and a co-defendant concerning a $200 check that was given as part of a loan to James Lemanski that had "bounced". The co-defendant stated that "Rusty didn't like the idea of what happened. See Rusty found out about it" (Transcript of March 14, 1971, pp. 1-17, Exhibits - Volume I). James Lemanski

testified that he received a $500 loan which included a $200 check (298-305). The $200 check was signed by a partner (he was authorized to sign the corporate checks) of Louis Breitbach. Breitbach had borrowed money from the defendant and then the defendant had a meeting with him to discuss several checks of his that were "bouncing" (627-629).

Murray had borrowed money from the defendants and could not meet the interest payments. He was also in trouble with his license as a bail bondsman. To solve Murray's plight, the co-defendants told him to recommend "customers" to them. Murray stated that the customers would have to make their own arrangements with the defendants and that he wanted to talk to "Rusty" to get his situation "squared away" (Transcript of March 14, 1971, p. 20; Exhibits - Volume I). Murray so testified at the trial (875-877).

On the same transcript, a co-defendant discussed various collections made during the day and mentioned that $6,500 was lent to Wink Realty Corp. The co-defendant then mentioned that there was only two points interest on the $6,500 because the other co-defendants would receive the profits from the sale of the house (Transcript of March 14, 1971, p. 45 - Exhibits - Volume I). William Murray testified that the defendant got two points interest on every loan (882-833). Louis Breitbach testified that $6,500 was lent to Wink Realty Corp. by a co-defendant and that another co-defendant got the profits (614-622). (See also Murray's testimony 944-952).

On the transcript of June 20, 1971, a co-defendant and William Murray discussed who got credit for a $360 interest payment (unnumbered pages 1-6; Exhibits - Volume II). The check for $350 (plus $10 cash) had "bounded". Murray was

called into Brooklyn to explain why his check had "bounced" (1013, 1019, 1543-1546). Murray asked the co-defendant if he told "Rusty" about it. The co-defendant said "No, no" and then stated, "I don't know if you want to burden him (Rusty) with this damn problem. He's so disgusted by what's happening now" (unnumbered p. 6; Exhibits - Volume II). A number of checks had "bounced" and this conversation shows the defendant's knowledge and control of the situation.

On the June 20, 1971 transcript, a co-defendant and Murray discussed whether or not Murray's payments on his loan were interest or principal. One co-defendant was treating the payments as interest and another co-defendant was treating the payments as principal. Murray stated that whatever one co-defendant told him was the deal. Murray stated, "It's not their money (the co-defendant's), it's Rusty's money

right". The co-defendant then answered "Right." Murray stated that he was getting "hot" because the co-defendants made him think it was their money. Murray wanted to go to the "source" in the city (unnumbered page 12; Exhibits - Volume II).

Murray fell behind on his interest payments and a co-defendant sent the interest payments to the city to "cover" Murray. On the June 30, 1971 transcript, Murray discussed this situation with a co-defendant and he wanted to know if Rusty said anything to another co-defendant concerning the loan. The co-defendant stated that "They (Rusty) were, they were gonna call him (co-defendant) in before but when you come down there.. that more or less squashed it" (p. 14; Exhibits - Volume II). The co-defendant stated, "But I don't know what the hell Frankie (co-defendant) said to him (defendant) if he said anything at all to him. Cause I know he (defendant)would have got pissed off. He didn't say nothing to me about it.

And I spoke to him. He didn't say nothing to me about it. He (defendant) said, he had seen him but he didn't say nothing about it. What he had said to him" (p. 15; Exhibits - Volume II). The co-defendant stated that the defendant had an appointment with the other co-defendants and since Murray met with the defendant there was no need for the meeting. The following conversation then took place:

> Murray: Or at least, you know, got it (payment) to you this time. So in case, he (defendant) starts thinking about it again.
> Co-defendant: Yeah.
> Murray: See. Rusty calls in Tony (co-defendant). F---g Tony's gonna climb all over me. You know it.
> Co-defendant: I know it.
> Murray: Tony's (co-defendant) gonna climb all over you (co-defendant that Murray's talking to) and Tony's gonna climb all over Joe (co-defendant).
> Co-defendant: He (defendant) gets Joe. He won't bother me till he grabs Joe.
> Murray: Sure, he'll (defendant) give you some S---.
> Co-defendant: He (defendant) gives me some but he grabs Joe. He rheems Joe.

Joe ... stepped on. I don't know.
(P. 16; Exhibits - Volume II)

Several pages later there is a discussion concerning the interest payments and that things will work out because the payments will start coming in (p.22).

POINT I

THE PETITIONER WAS NOT DEPRIVED OF ANY RIGHT UNDER THE SIXTH AMENDMENT TO CONFRONT WITNESSES AGAINST HIM

Count one of the indictment charges the defendant with the crime of conspiracy to commit the felony of criminal usury between the months of September, 1970 to July, 1971, and count four charges him with the felony of criminal usury in the month of September, 1970 with respect to the loan to William Murray.

The existance of a conspiracy may be proved from circumstantial evidence and this Court has stated the proposition in the following

language:

> "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collation of circumstances' (case omitted)". [Glasser v. United States, 315 U.S. 60 at 80]

Furthermore, there is no requirement that all the conspirators participate to the same degree in the fulfillment of the conspiracy [United States v. Phillips, 270 F.2d 175 (2d Cir.)].

In this case, the jury heard evidence of particular acts, which, when taken together, furnished a basis for a finding that the crimes of conspiracy and criminal usury existed in connection with the loan to William Murray.

Murray testified that he negotiated his loan with a co-defendant, and that two co-defendants were present when he received part of his loan. At the same time, a co-defendant took

Murray's car registration as security and told him that he would have to pay three points interest each week. Murray testified that he met the defendant and the four co-defendants in New York City and that the defendant stated that Murray would get the loan because the co-defendants spoke "highly"of him.

Murray testified that the defendant, who was not present when a co-defendant delivered the $1,500 to Murray and took his car registration, stated that there was no need for the security and that Murray's car registration should be returned. Another co-defendant again confirmed the three points interest payments each week.

Murray testified that the defendant took out an envelope, gave it to a co-defendant and stated, "Here hold on to this. This is the rest of the loan". The co-defendant then gave the envelope to the co-defendant who had previously delivered the $1,500 to Murray. Later, defendant stated, "Let's give the kid his money and get out

of here. It's getting late." Outside the bar, the co-defendant gave Murray this envelope and Murray counted $3,500 in cash. Murray paid $150 interest each week for four or five months (the equivalent of about $7,500 interest on the $5,000 loan).

In short, William Murray negotiated his loan with one co-defendant; received pat of his loan from two co-defendants, and had his car registration taken as security; received the balance of his loan when all five defendants were present; and had his registration returned by the defendant even though he was not present when it was taken. Several different co-defendants collected the interest payments.

This evidence was legally sufficient to establish beyond a reasonable doubt every element of the crimes of conspiracy and of criminal usury in connection with William Murray's loan (count

four) and the defendant's commission thereof (Penal Law Section 190.40; People v. Connolly, 253 N.Y. 330; People v. Peckens, 153 N.Y. 576; People v. Miles, 123 App. Div. 862, affd. 192 N.Y. 541; Glasser v. United States [Roth], 315 U.S. 60).

William Murray testified that he paid $150 interest each week for four or five months and then he experienced difficulty in making the interest payments. The co-defendant told him to recommend "customers" to the defendant at four points interest each week.

The jury heard testimony from six witnesses ("customers") that they borrowed varying sums of money from the co-defendants and repaid it at usurious rates of interest.

William Murray had a tape recorder and later a transmitting device placed on him and conversations between him and the co-defendants were recorded and introduced into evidence. The

conversations all took place during the negotiating or lending of money or the collection of interest.

The conversations indicate that the defendant lent the money; that he received two points interest each week on each loan; that he had knowledge and control over the operation in Suffolk County; that he was disgusted by the number of checks that had "bounced"; and that he called several meetings with the co-defendants to "rheem them out" (see Facts, supra)

"A prima facie of conspiracy (as to Murray's loan - author) having been established, evidence of every act of the individual conspirators done in furtherance of the common purpose is admissible" [People v. Connolly, 253 N.Y. 330 at 340; People v. Jelke, 1 N.Y.2d 321 at 337; People v. LaBarbera, 274 N.Y.239; People v. Ryan, 263 N.Y. 298].

Penal Law Section 190.40 states in part, that a person is g lty of criminal usury when he takes or receives any money, at a rate exceeding twenty-five percentum per annum. Every tape recorded a conversation that was uttered during the collection of interest payments from the various witnesses and was uttered in furtherance of the common purpose.

Finally, the use of a tape recorder to preserve the conversations and its subsequent introduction into evidence has been permitted [Osborn v. United States, 385 U.S. 323; People v. Gibson, 23 N.Y.2d 618].

Therefore, the evidence was legally sufficient to establish beyond a reasonable doubt every element of the crimes of conspiracy and of criminal usury in connection with the five additional loans [Penal Law Section 190.40; People v. Connolly, 253 N.Y.330; People v. Peckens, 153

N.Y. 576; Kelley v. People, 55 N.Y. 565].

The existence of a conspiracy and the petitioner's participation therein, having been established by sufficient evidence, the petitioner was not deprived of his right to confront witnesses by the introduction into evidence against him of statements made by his co-conspirator. This evidence did not violate the rule announced in Bruton v. United States [391 U.S. 123, Anno. Confrontation Clause - Bruton Rule 29 L. E2d 931; see also People v. Miranda, 23 N.Y.2d 439]. Those cases dealt with a confession by one defendant (naturally it was after the crime was completed) which also implicated his co-defendant. The confession was then introduced at the joint trial, and bound the one who uttered it. The jury was told that it did not bind the other defendant [Delli Paoli v. United States, 352 U.S. 232]. Bruton held that the limited instructions concern-

the confession were improper. However, the court did state that the admission of a statement which constitutes a recognized exception to the hearsay rule, does not violate the Sixth Amendment [Bruton v. United States, supra at 128 n.3; Dutton v. Evans, 300 U.S. 74 at 80 and 86; United States v. Littoran, 421 F. 2d 981 (2d Cir.); see Facts, supra]. This rule was recently reaffirmed by this Court in United States v. Nixon, 418 U.S. 683.

Since there was a sufficient showing of a "joint venture" among the co-defendants, including the defendant, the statements of the co-defendants were all admissible as declarations in furtherance thereof and Bruton is not controlling [Dutton v. Evans, supra; United States v. Nixon, supra; United States v. Weiser, 428 F.2d 932 (2d Cir)].

Finally, any acts and declarations of the co-defendant while participating in the crime are admissible against the other participants as part of the res gestae and are a recognized except-

ion to the hearsay rule [People v. Vaccaro, 288 N.Y. 170; People v. Luciano, 277 N.Y.348; People v. McKane, 143 N.Y.455; 22 A CJS Criminal Law Section 77].

Every tape recorded a conversation that was made during the collection of interest payments from the various witnesses. The statements implicating the defendant were part of the res gestae since the Penal Law of New York State [see, McKinney's Penal Law, Book 11A, Section 190.40] states that it is a crime to charge, take or receive interest at a rate of interest in excess of twenty-five percent per annum.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN ALL RESPECTS.

Respectfully submitted,

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Dated: October 30, 1975